

ORIGINAL

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

RECEIVED
JUN 18 1999
FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of) MM Docket No. 91-58
)
Amendment of Section 73.202(b)) RM-7419
Table of Allotments)
FM Broadcast Stations) RM-7797
(Caldwell, Texas, et al)) RM-7798

To: The Commission

DOCKET FILE COPY ORIGINAL

REPLY COMMENTS IN RESPONSE TO
COMMENTS OF BRYAN BROADCASTING LICENSE SUBSIDIARY, INC.
AND FCC ORDER DA 99-1050 SUBSEQUENT TO JUDICIAL REMAND

Respectfully Submitted,

ROY E. HENDERSON

by: Robert J. Buenzle

His Attorney

Law Offices
Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090
(703) 715-3006

June 18, 1999

No. of Copies rec'd 019
List ABCDE

S U M M A R Y

The Instant pleading is a Reply by Roy E. Henderson ("Henderson") to Comments filed in this proceeding by Bryan Broadcasting License Subsidiary, Inc. ("Bryan"). Since Bryan's Comments when filed were not properly served upon Henderson, Henderson was afforded time to June 18 in which to respond to Bryan. The main theme in Bryan's Comments was that a recent application filed by Bryan with the Mass Media Bureau changing the facts of Bryan's proposal should be recognized as improving Bryan's case to the point that the pending appeal and remand from the Court of Appeals should be considered "Moot".

Henderson also argues in this pleading that Bryan has recently disclosed the existence of further false information in applications filed by Bryan which raise additional serious questions as to the fitness of Bryan as a Licensee and as to the conduct of Bryan in this case. Henderson also argues that, in any event, the new analyses and decision ordered by the Court should be upon facts properly before the FCC at the time of its last decision, which is also consistent with facts existent at the time of Judicial remand and that any subsequent actions by Bryan to seek to change the facts, most notably its new application filed April 19, 1999, should not be recognized for any purpose in the decision of this case.

I N D E X

Summary.....	i.
I. The Substance of Bryan's Comments.....	2
II. New Evidence of Deception By Bryan Should be Considered....	4
III.Summary.....	12
IV.Conclusion.....	14

Attachments:

1. Opposition to "Informal Objection And Motion To Deny Application or Designate Application For Evidentiary Hearing" filed by Bryan Broadcasting with the FCC Mass Media Bureau June 4, 1999.
2. Reply To "Opposition to Informal Objection And Motion To Deny Application or Designate Application For Evidentiary Hearing" filed by Roy E. Henderson with the FCC Mass Media Bureau June 16, 1999.

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.

In the Matter of)	MM Docket No. 91-58
)	
Amendment of Section 73.202(b))	RM-7419
Table of Allotments)	
FM Broadcast Stations)	RM-7797
(Caldwell, Texas, et al))	RM-7798

To: The Commission

**REPLY COMMENTS IN RESPONSE TO
COMMENTS OF BRYAN BROADCASTING LICENSE SUBSIDIARY, INC.
AND FCC ORDER DA 99-1050 SUBSEQUENT TO JUDICIAL REMAND**

On April 9, 1999, the Commission released a letter in this proceeding (DA 99-673) inviting final Comments and Reply Comments on April 29, 1999 and May 14, 1999, respectively.

On April 29, 1999, Bryan Broadcasting License Subsidiary, Inc. ("Bryan") filed Comments but did not serve Roy E. Henderson ("Henderson"), the other party in the proceeding, with a copy of the Comments as required. Henderson filed his Reply Comments on May 14, 1999, but made no direct response to the Bryan Comments which had not been served.

On May 18, 1999, Bryan filed a "Motion To Consider" its Comments, admitting that they had not been properly served when filed, but requesting the Commission to receive and consider them, as they were being served along with the "Motion to Consider". By Order released June 4, 1999, the Commission granted the Motion to Consider and provided a period of time to June 18,

1999, in which Henderson could file a Reply directed to the Bryan Comments. The Reply is submitted herewith.

In the Comments filed by Henderson on April 29, 1999, Henderson predicted that Bryan would try to change the facts of the case before the Commission by moving its site to a new location in compliance with the city coverage rule of 73.315(a) (See Henderson Comments at pg 16 - 18). At that time Henderson indicated that such an action, viewed against the past actions of Bryan in this case, most especially those described in Henderson's Second Supplement, would be nothing less than an abuse of the Commission's processes, and would be seen as such by Henderson. Predictably, in an attempt to avoid the analyses mandated by the Court of Appeals in its remand of this case, Bryan, on April 19, 1999, did exactly that, filing an application to modify its permit to seek to change its site before the FCC re-analyses of the case subsequent to remand.

I. The Substance of Bryan's Comments

In its Comments as filed without service on April 29, Bryan revealed its most recent filing and suggested that the analyses about to be undertaken by the Commission should be simply considered as "moot" now. That was the centerpiece of their Comments: don't look at any of the deceptions or lack of candor as outlined in the Second Supplement, pay no attention to the fact that Bryan had been fully content with its non-compliant site since it specified it with full knowledge of its deficiency in July of 1997, through its receipt of a construction permit of

that site in March of 1998, through the FCC's final Decision (which failed to take note of that fact) in July of 1998, and, in fact right up to April 19, 1998, when Bryan decided it should start looking for a new compliant site.

Why the sudden change of heart on August 19, 1998? Could it possibly have anything to do with the fact that Henderson filed his Notice of Appeal of this case with the U.S. Court of Appeals on August 14, 1999? Four days after the Notice of Appeal was filed and Bryan knew that its non-compliant proposal would be receiving a full and comprehensive review, it decided to look for a new site, offer a last-minute change of facts, and make everything right for them, or as Bryan would say, "moot".

The fact of the matter is that Bryan's attempt to make a last-minute change in the facts of this case is the be-all and end-all of its Comments. There is nothing else new in there, nothing that hasn't been argued by Bryan before, answered by Henderson before, and given full consideration, if not credence, by the Commission. The decisions by the Commission are clear and consistent. The decisions went in favor of Bryan over Henderson for the one reason that the Commission knew of a de minimis non-compliance of Henderson (4% area, 25 people) with 73.315(a) but did not know about a substantial admitted non-compliance by Bryan (8.4% area, 4,158 persons).

As far as the Commission knew, Bryan was in 100% compliance with 73.315(a), so the analyses was that although it was recognized and undisputed that the Henderson proposal was far

superior in terms of persons and area which would receive new service, the Commission would select Bryan over Henderson because it thought (mistakenly) that Bryan was in compliance with 73.315(a) and Bryan was not. It was recognition of the importance of this missed fact and the non-compliance of Bryan that was the basis for the Commission's request for remand of the case. It is the fundamental matter of the case, it is the fact that Bryan is now desperately trying to change, and it is what we will concentrate upon in this Reply.

II. New Evidence of Deception By Bryan Should Be Considered

The essential document that is the base of the Henderson appeal, and the Commission's request for remand is Henderson's Second Supplement that was filed in September of 1997. This pleading addressed two applications filed by Bryan on January 21, 1997, along with an "Amendment" filed by Bryan on July 15, 1997. The Second Supplement suggested that the Form 301 for a construction permit on channel 236C2 filed on January 21 was a sham application, including at least one outright misrepresentation, and proposing a facility that was never intended to be built.

As Henderson noted, it was only when the FCC staff proceeded to process that application and found no evidence at the FCC OR the FAA of a new tower being proposed by Bryan, that Bryan quickly abandoned the application, offering no explanations other than to note there had been some "confusion". The Amendment filed in place of the original proposal was entirely different,

proposing a lease at someone else's existing tower and an operation that would admittedly fall substantially short of compliance with 73.315(a) (it is important to note here that the original "new tower" proposal had contained the assurance by Bryan of full and complete compliance with 73.315(a)).

Subsequent to Henderson's Second Supplement, Bryan filed an Opposition that was more notable for what it did not say than for what it said. What it said was basically that it could do what it wanted as far as non-compliance with 73.315(a) at this stage of the case since the Mass Media Bureau had a more relaxed view of compliance and that it was essentially too late for anyone to do anything about that. What it did not say was anything at all in explanation or attempted rebuttal of the several serious questions raised in the Second Supplement. No response as to the false statement on the FAA filing, no response as to the apparent sham nature of the January 21, 1997 Form 301 application. The failure to offer any explanation or rebuttal seemed strange then, but does not seem so strange now. As we will explain below, the truth was far worse than the allegations.

On May 14, 1999, the same day that Henderson filed his Reply Comments in this proceeding, he also filed An Informal Objection with the Mass Media Bureau against Bryan's April 19, 1999, application, alleging abuse of process, deception, and lack of candor, and requesting denial or dismissal of the application or that it be set for hearing. With the filing of this Informal Objection, Bryan had no place left to hide and was virtually

required to offer whatever explanations it might have. It proceeded to file an Opposition on June 4, 1999 which revealed that the deceptions described in the Second Supplement were only the tip of the iceberg. Consider this:

The Form 301 filed January 21, 1997, with Engineering by Ben Downs and signed by William Hicks proposed construction of a new tower by Bryan who would be the sole occupant of the tower. It represented that the Station as built would be in full and total compliance with the city-grade coverage requirements of 73.315(a). It represented that Bryan had already filed written notice of the tower construction with the FAA. In a companion application Form 307 to extend the other construction permit held by Bryan, Bryan referred directly to the Form 301 that had been filed that same day and described in vivid detail how Bryan was building a new tower, how Bryan had found a site and had discussions with tower construction companies, and how much it would cost Bryan to build its tower.

It had already been established that the statement on FAA certification was false, and that was bad enough. But that was nothing compared to what Bryan was forced to reveal in its

Opposition filed with the Mass Media Bureau on June 4, 1999. 1/ In that document Bryan reveals and admits for the first time ever, that it never intended to build a new tower and that all it did was consult with Chet Fry 2/ about being a tenant on a new tower Mr. Fry was considering to build. So much for Bryan's representations to the Commission about it being the only one to occupy IT's tower, about how it found IT's new site, how it had all those talks with tower construction companies to build IT's new tower, and how committed it was to this construction despite the large amount of money it would cost Bryan to complete the construction. It is now apparent that all of these statements were totally false, direct and deliberate misrepresentations to the Commission.

1/ This extraordinary document which reveals for the first time ever the additional and very substantial false statements by Bryan in the January 21, 1997 application, was filed with the Mass Media Bureau but was not served on the full Commission. As such, and since these further deceptions go directly to Bryan's non-compliance with 73.315(a), a basic consideration in this case, and should be revealed and documented in the record of this case, Henderson is attaching hereto a copy of the Bryan Opposition along with Henderson's Reply Pleading as filed June 16, 1999.

2/ Mr. Fry is not new to this case, having provided a statement in support of Bryan in a Supplemental Response filed by Bryan on June 11, 1992. At that time Mr. Fry tried to convince the Commission that Henderson had no right to his site since, according to Mr. Fry, 'the owner of the site had told him that it was not available to Henderson and she would only deal with Mr. Fry (who had, and still has, an existing tower on the site)'. Unfortunately for Fry and Bryan, the owner denied ever saying such a thing and reaffirmed her agreement to make the site available to Henderson in a letter written to the Commission and included in Henderson's Motion to Strike filed July 10, 1992. In any event, Mr. Fry did his best to assist Bryan in this case.

But that is not all. It has now also been revealed that the statement included in Bryan's January 21, 1997, Form 301 that the proposed construction was in full and total compliance with the city coverage rules of 73.315(a) was also a completely false statement with the truth of the matter being that it was in substantial non-compliance with that rule. According to the Affidavit of Mr. Stype, Consulting Engineer to Bryan, the original application was not in full compliance but 'would be more than 80%'. We suspect that the non-compliance of the first application would have been about the same as in the Amendment application filed July 15, 1997, i.e. missing almost 9% area and well over 4,000 persons, the one big difference being that the substantial non-compliance was admitted in the second application, but not disclosed in the first application. With the revelation of this further false statement, it is now known that Bryan had never filed an application or proposal with the Commission that was in full compliance with 73.315(a). Never.

Having now been forced to disclose these further untruthful representations made to the FCC in its applications let us take just a moment to comment on the "explanation" now offered. Ben Downs is an Executive Vice-president and holder of almost 11% voting stock in Bryan. It was Downs who prepared the engineering portion of the Form 301 filed January 21, 1997, signing it only as "Technical Advisor" (sic). It was Downs who stated in that application that Bryan had already notified the FAA of 'its proposed construction', providing the specific date of that "notification", and Downs who indicated that the tower being

built by Bryan was for Bryan alone, not being shared with any other licensee (Response to Paragraph 3 of the engineering portion of Form 301). We do not know if Downs also had a hand in the preparation of the Form 307 filed that same day that further described the many wonders of Bryan's new tower, and made specific reference and reliance upon the Form 301 prepared and filed by Downs.

During the full course of this case, Bryan has had the services of highly skilled professional communications legal counsel as well as highly skilled professional communications engineering consultants. We do not recall any other applications submitted by Bryan with the engineering done by Downs rather than by their regular professional engineers. In any event, Downs decided to do the engineering on this one himself, "to save money" according to Downs. According to Downs, 3/ a subsequent review of his application undertaken by Mr. Stype of Carl E. Smith Engineers in June of 1997 had revealed the existence of a substantial non-compliance with 73.315(a) which, according to Downs in his Declaration, was the result of a map that "did not accurately portray the [city] boundaries. Conversely, in his Affidavit, Stype says that the map was accurate and that Downs read it wrong, Stype then surmising that this misreading was the result of the "inexperience" of Mr. Downs.

3/ All references to statements by Downs, Stype or Chet Fry are from Declarations or Affidavits filed with the Bryan Opposition to Informal Objections, June 4, 1999, as attached hereto.

As to the new "spin" that Bryan never really intended to build its own tower but only to lease a space on Fry's new tower, Fry in his Declaration would only go as far as saying that he had talked to Downs about being a tenant on Fry's planned new tower and also about Downs's suggestion as to where the tower should be built, but they were only discussions, not agreements and not understandings. Nonetheless, when Downs filed the application, he made it clear that the proposal was for a tower to be built by and solely for Bryan, not for a leased space on anyone else's tower, totally inconsistent with the statements now made by Downs in his Declaration in the Bryan Opposition.

Similarly, Downs now admits making the false statement about the FAA filing and now states that he did that based upon his "understanding" that Fry had done that 4/ for him. Again, Downs gets no support from Fry on this in Fry's Declaration. Moreover, Downs does not explain how his "understanding" became so explicit as to provide an exact date for that notification as supplied by Downs in the application, nor does he explain why he never inquired of Mr. Fry as to the the status of his "understanding" for a period of seven months.

Most difficult of all the positions taken by Downs is his claim now that Bryan had, from the very start, intended only to

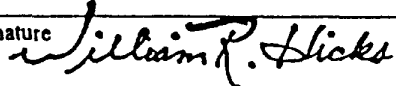
4/ It is also relevant to note here that to the extent that Fry built a new tower adjacent to his old one, he did not feel the need to notify the FAA on that, consistent with Henderson's position all along in this case that the existence of this FAA approved tall tower (taller than Henderson's proposed tower) on the same site as Henderson's site, establishes its acceptability to the FAA.

be a lessee on a tower they expected Fry to build. Given the representations made in the two January 21, 1997, applications how can he possibly say that? If Bryan was only going to be one of several lessees on Fry's tower, how could Downs indicate in paragraph 3 of the engineering section of form 301 that the tower was theirs alone and that no one else would be on the tower. Not even Mr. Fry. That is simply absurd. Moreover, if they always meant only to be a lessee on Fry's tower, what was the basis of all that discussion in Form 307 about their tower construction contractors, and the enormous cost they were going to bear in building the tower? In the parlance of cross examination, were they lying then or are they lying now?

Finally, there is an apparent question of the authenticity of the signatures on the two applications filed by Bryan on January 21, 1997. Both applications were indicated as certified and executed by William Hicks, President of Bryan. Set forth below are copies of the signatures on the two applications:

FCC FORM 301

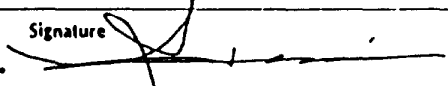
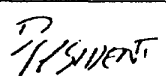
I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Name William R. Hicks	Signature 
Title President	Date 10/8/96
Typed or Printed Name of Person Signing William R. Hicks	

WILLFUL FALSE STATEMENTS ON THIS FORM ARE PUNISHABLE BY FINE AND/OR IMPRISONMENT (U.S. CODE, TITLE 18, SECTION 1001), AND/OR REVOCATION OF ANY STATION LICENSE OR CONSTRUCTION PERMIT (U.S. CODE, TITLE 47, SECTION 312(a)(1)), AND/OR FORFEITURE (U.S. CODE, TITLE 47, SECTION 503).

FCC FORM 307

2. I certify that the statements in this application are true, complete, and correct to the best of my knowledge and belief, and are made in good faith.

Name Bryan Broadcasting License Subsidiary, Inc.	Signature 
Title 	Date 11/15/97

We are not forensic handwriting experts but there seems to be something wrong here. We note that this matter was discussed further by Henderson in his Reply pleading (attached hereto) filed with the Mass Media Bureau on June 16, 1999 at pages 13 and 14 and Attachment Two.

Again, all of these deceptions and infirmities being dragged into the light, piece by piece, are relevant to Bryan's suggestion that the filing of its most recent application on April 19, 1999 simply "moots" everything, with no need to look at the record Bryan has built in this case. It would seem that as Bryan goes through its contortions to seek to avoid the analyses required by the Court's remand, its hands are not exactly "clean" and that with each new pleading filed by Bryan, with each new revelation that what it said before was not true, the extent of its prior deceptions becomes more stark and more profound.

III. Summary

Based upon the Downs Declaration, it seems now inescapable to conclude that the representation in its two applications filed January 21, 1997, that it was going to build a new tower, was a flat-out lie. Moreover, if we are to believe the Declaration of Ben Downs, they knew all along that it was a lie, that contrary to what they said in the two applications filed January 21, 1997, they never had any intention to build a new tower. This is all the more obvious since it was Downs who prepared the engineering in Form 301 filed January 21, 1997, which clearly indicated Bryan's representation to the Commission that Bryan was building

a new tower, and it is also Downs who now says in his Declaration that they never had any intention to build their own tower. These two positions are simply irreconcilable. 5/

It is now established that the representation made by Bryan in the January 21, 1997, application that Bryan's station would be in "full compliance with 73.315(a)" was equally false, that it was in substantial non-compliance with 73.315(a) and that it is now established that it never submitted a proposal that complied with 73.315(a), not the original application in January of 1997, and not the "amendment" filed in July of 1997. The fact that on this one occasion Downs decided to do his own engineering and could not properly read the map defining the city limits, let alone the fact that he would not know what those city limits were just by being in that community and operating a radio station there for over ten years, is just not credible.

Similarly, the "explanation" for the false statement as to the FAA notification is beyond credibility. How could he simply "assume" someone else filed that notice; how did he "assume" a

5/ Since the Commission will be reviewing Henderson's Second Supplement and Reply to Opposition to Second Supplement as part of its final analyses on this case, It might also count up the number of times that Henderson referred to the "new tower being built by Bryan" and note that nowhere in its Opposition to the Second Supplement or anywhere else until the Opposition to Informal Objection filed on June 4, 1999, almost two years later, did Bryan ever seek to "correct" the references to Bryan's proposed construction of a new tower, did it ever suggest that those references were somehow incorrect, did it ever suggest that it had only been proposing to be a lessee on someone else's tower. This new "story" appears to be nothing more than a convenient afterthought concocted to explain the unexplainable. It is so outrageously false that it only makes Bryan's position worse.

specific date for that notice; how could he not even inquire for a period of over seven months as to the status of the alleged notification. Even his old friend Chet Fry provides no support for any such "assumption" by Downs. It is just unbelievable.

Lastly, we would note one further point on this matter. According to the Downs Declaration and the Stype Affidavit, the fact that both the FAA statement and the representation of full compliance with 73.315(a) as indicated to the Commission on January 21, 1997, were false statements became known to Bryan in June of 1997. Nonetheless, Bryan never admitted or disclosed those false statements of fact to the Commisison and instead kept them concealed for two and one-half years until being virtually forced to do so in their Opposition filed June 4, 1999. Is this the way it is supposed to work?

IV. Conclusion

The information originally submitted by Henderson in his Second Supplement, was decisional in nature and led to the remand of this case. The additional deceptions now disclosed by Bryan underscore what was originally set forth in the Second Supplement. With such a track record of deceit and deception, Bryan is in no position to request any further consideration from the Commission. In addition, as indicated in Henderson's original Comments, equity, as well as prior case law applicable to comparative proceedings, requires that Bryan be estopped from trying to make a last-minute change in the facts of this comparative rulemaking case. To allow Bryan, with its record, to

seek to evade the remand of the Court of Appeals by submitting a last-minute change of facts would be unconscionable.

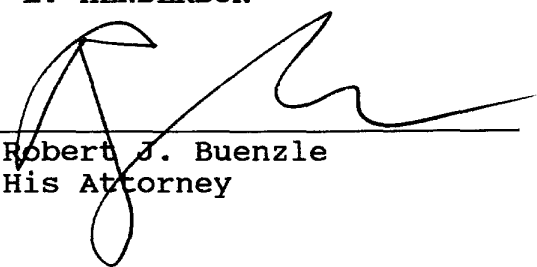
Whatever the Commission decides in this case, it should be upon the facts that were properly before the Commission at the time of its decision in this case as released July 22, 1998, the time when the facts set forth in the Second Supplement should have been considered.

Wherefore, Roy E. Henderson submits that the Commission should now proceed to the final analyses and decision mandated by the Court, based upon the facts of record in the proposals of Bryan and Henderson as of July 22, 1998, as consistent with the record on March 8, 1999, the date of remand from the U.S. Court of Appeals, and that, based upon that record, the Henderson proposal should be adopted and the Bryan proposal denied.

Respectfully Submitted,

ROY E. HENDERSON

by



Robert J. Buenzle
His Attorney

Law Offices
Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, Virginia 22090
(703) 715-3006

June 18, 1999

ATTACHMENT ONE

**Opposition to "Informal Objection And Motion To Deny Application
or Designate Application For Evidentiary Hearing"
filed by Bryan Broadcasting with the FCC Mass Media Bureau
June 4, 1999.**

**Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C.**

In the Matter of

Application of)	
Bryan Broadcasting License Subsidiary)	
to Modify Construction Permit of)	BMPH-990419IB
KTSR(FM), College Station, Texas,)	
to Change Channel from 221A and)	
197C3 (Unbuilt C.P.) to 236C2 and to Change)	
Transmitter Site and Parameters)	

To: Chief, Mass Media Bureau
Audio Services Division

RECEIVED
JUN 7 1999
LAW OFFICES R.J. BUENZLE

**OPPOSITION TO INFORMAL OBJECTION AND MOTION TO DENY APPLICATION
OR DESIGNATE APPLICATION FOR EVIDENTIARY HEARING**

Bryan Broadcasting License Subsidiary, Inc. ("Bryan"), licensee of station KTSR(FM), College Station, Texas (hereinafter "KTSR"), by its attorneys, hereby responds to the "Informal Objection and Motion to Deny Application or Designate Application for Evidentiary Hearing" ("Motion"), filed by Roy E. Henderson on May 14, 1999. Henderson's Motion betrays his increasingly conspiratorial mindset, but is without merit and provides no basis for denying KTSR's application or conducting a hearing. The Commission should reject Henderson's Motion, and expeditiously grant the above-captioned application.

Background

With the above-captioned application, KTSR seeks to modify its construction permit, granted in 1998, for channel 236C2 in College Station, Texas.^{1/} KTSR was granted this construction permit pursuant to the Commission's 1995 decision in a long-standing FM channel allotment proceeding involving the College Station and Caldwell, Texas markets. In that July 5,

^{1/} See Letter from James D. Bradshaw, Supervisory Engineer, Mass Media Bureau, to Bryan Broadcasting Lic. Subsidiary, FCC File No. BMPH-9701241A (March 20, 1998).

1995 order, the Commission's Mass Media Bureau granted KTSR's allotment proposal substituting Channel 236C2 for Channel 297C3 in College Station, Texas and substituting Channel 297A for Channel 236A in Caldwell.^{2/} In doing so, the Commission rejected Henderson's proposal to substitute Channel 236C2 for Channel 236A in Caldwell. Henderson filed a Petition for Reconsideration and later an Application for Review of this decision, both of which were rejected by the Commission,^{3/} and while Henderson's Application for Review was pending, the Commission granted KTSR its current construction permit. KTSR now seeks to modify its operations at 236C2.^{4/}

Discussion

I. Grant of the Application of KTSR, Which Fundamentally Has the Flexibility to Modify Its Construction Permit, is in the Public Interest

As discussed further below, most of Henderson's Motion is devoted to issues that pertain to the related FM channel allotment proceeding. As a fundamental matter, Henderson's efforts to connect these two proceedings should be rejected. KTSR's application for a specific transmitter site, while pursuant to its channel allotment, is not a filing in that allotment proceeding, and this application must be considered separately on its own merits.^{5/} Henderson entirely ignores that

^{2/} Report and Order, 10 FCC Rcd 7285 (M.M Bur. 1995) ("Order").

^{3/} Memorandum Opinion and Order, 11 FCC Rcd 5326 (1996); Memorandum Opinion and Order, 13 FCC Rcd 13772 (1998).

^{4/} Following the Commission's final decision upholding KTSR's allotment plan, Henderson filed an appeal of this decision in the U.S. Court of Appeals for the D.C. Circuit, and the Commission subsequently realized that it had inadvertently failed to consider Henderson's argument in that allotment proceeding that KTSR's construction permit for the upgraded facility on Channel 236C2 would provide less than complete city-grade coverage of College Station. This allotment proceeding has now been remanded back to the Commission. Order, Henderson v. FCC, D.C. Cir. 98-1372 (March 8, 1999).

^{5/} Henderson points to cases that hold that parties cannot present new arguments in a Commission proceeding after the Commission has already rendered a final decision.

(continued...)

fact that as a permittee, KTSR has the flexibility to choose a site *in an application proceeding* which meets its needs at the moment, with such flexibility including the right to file an application that improves service to its community of license by achieving full city-grade coverage.^{6/} This is the same right that any permittee or licensee has with respect to any transmitter site selection to be submitted to the FCC on a Form 301, as long as that application does not itself propose a change in the Table of Allotments. See, e.g., Barry Skidelsky, 7 FCC Rcd 5577 (1992); Greenwood, South Carolina, 3 FCC Rcd 4108 (1988); John R. Hughes, 50 Fed. Reg. 5679 (February 11, 1985). Such flexibility is critical in the broadcast industry, with existing stations forced to change transmitter sites over time for a myriad of reasons -- leases expire, areas develop and become more valuable for commercial operations than for tower sites, and populations in a region shift over time. The Commission should act consistent with its licensing framework and expeditiously grant KTSR's modification request.

Even if Henderson's conspiracy theories were correct, and KTSR was filing the instant application solely because of the pending remand in the allotment proceeding (which, as set forth below, it is not), that would make absolutely no difference to the analysis of this application. The decisive issue in that rulemaking was the fact that Henderson's proposal could never place a city-

^{5/} (...continued)
Henderson Motion at 15 (citing Colorado Radio Corp. v. FCC, 118 F.2d 24, 26 (D.C. Cir. 1941), Tidewater Teleradio, Inc., 24 RR 2d 653 (1962)). This point can only be relevant to the channel allotment proceeding (although KTSR does not think that it is) and has no relevance to processing the instant application. If this application complies with the rules, and KTSR submits that it does, it should be granted. Any impact the grant may or may not have on the allotment proceeding should be weighed in that proceeding.

^{6/} KTSR's existing construction permit for operation at Channel 236C2 provides city-grade coverage to 91.6% of College Station. While such coverage complies with the Commission's rules, grant of the instant application would enable KTSR to operate from a new site that will achieve full city-grade coverage of College Station. This improvement in service is in the public interest, and the Commission should grant KTSR's application.

grade signal over all of the Caldwell, his proposed city of license, while KTSR's proposal suffered no such infirmity. This application is demonstrative of that difference. KTSR's application allows KTSR to place a city-grade signal over all of College Station, a result which Henderson can never achieve with respect to Caldwell.

This application is not filed in the allotment process, but instead is separately considered on its own merits. Commission case law makes clear that the allocation and application processes are different processes with different rules.^{7/} Henderson's attempt to confuse these processes is misguided, and must be rejected.

II. Henderson's Preposterous and Conspiratorial Arguments Regarding KTSR's Conduct and Character Should be Rejected

In his Motion to Deny KTSR's application, Henderson presents an endless litany of accusations against KTSR, and argues that KTSR's conduct in the related FM allotment proceeding, MM Docket No. 91-58, warrants denial of the instant application. Henderson claims that KTSR has "seriously abused the Commission's processes," and that KTSR's filings in the channel allotment proceeding have "reflected not only a continuing lack of candor but also outright deception." Motion at 1. Henderson asserts that KTSR knew all along that operation from its intended transmitter site would not provide full city-grade coverage, but concealed this fact from the Commission to protect its advantage in the allotment proceeding. Motion at 5-6. Henderson further claims that KTSR's January 1997 construction permit application deliberately misrepresented KTSR's intended tower site, the extent of its city-grade coverage, and whether it had obtained FAA approval for this tower. Motion at 7-10. Henderson alleges that this "sham" application was not filed in good faith and was never intended to be fulfilled, and that KTSR's goal with this "charade" was to hide its failure to achieve full city-grade coverage from the

^{7/} See, e.g., Skidelsky; Greenwood; Hughes (cited supra at 3).

Commission until there was a final decision on Henderson's appeal. Motion at 20-22. He further charges that the truth on these matters was "flushed out" by the Commission and exposed in KTSR's subsequent July 1997 amendment to its construction permit. Motion at 9-10.

Henderson's characterizes the instant application to modify KTSR's construction permit as an "11th hour blowout-patch" to save its allotment proposal and "the last step in a series of manipulative and disingenuous actions . . ." Motion at 15. Henderson claims that KTSR's "one and only purpose" with this application was to avoid consideration of its construction permit as it currently stands. Motion at 22.

Because of this conduct, says Henderson, KTSR's modification application should be denied or dismissed, or, in the alternative, designated for hearing to fully determine the facts and circumstances of KTSR's actions and the effects of those actions upon KTSR as a Commission licensee.

The tales of intrigue and deceit that Henderson so wishes to be true are merely a figment of his conspiratorial imagination. Simply put, there was no conspiracy or plot executed by KTSR in this case, and Henderson's misguided ramblings should be rejected by the Commission. As described in detail in the attached Declaration of Ben Downs, Executive Vice President of Bryan Broadcasting License Subsidiary, Inc. (the "Downs Declaration"), KTSR's conduct in these proceedings has always been in good faith, fundamentally consistent with Commission rules, and motivated by legitimate engineering and business concerns. Any mistakes contained in KTSR's FCC filings in this proceeding were unintentional and the result of miscommunication in certain business relationships, and these errors certainly should not weigh against a grant of the instant application.

First, contrary to what Henderson is so sure must be true, KTSR did not always have a definitive tower site ready to go during the allotment proceeding. As indicated in the Downs

Declaration, and confirmed in the attached Declaration of Chet Fry ("Fry Declaration"), following the Commission's grant of KTSR's allotment proposal, KTSR management held discussions regarding a tower with Mr. Fry, a local tower owner, in 1996. Mr. Fry had an existing tower, and had plans to replace that tower with a new one. KTSR discussed locating on that tower as a principal tenant, and had specific discussions regarding where that tower could best be constructed to be of use to KTSR. On the basis of those conversations, KTSR erroneously believed that Mr. Fry had agreed to locate his new tower at a site that it had specified, and prepared its January 1997 application based on that belief. As a cost-savings measure, rather than hire an engineer, Mr. Downs himself prepared an application for a construction permit for operation at that site. In this application, Mr. Downs specified Mr. Fry as the contact person regarding the proposed tower. Mr. Downs understood that Mr. Fry had notified the FAA regarding this new tower, and Mr. Downs thus indicated in this January 1997 application that such notification had occurred.

Because of the uncertainties of the allocations process, KTSR had been unable to commit to a firm date for use of Mr. Fry's tower. After KTSR's application had been prepared, without notice to KTSR, Mr. Fry went ahead and replaced his existing tower at its current site rather than building his tower at the site specified by KTSR. Because of this decision, Mr. Fry never needed to notify the FAA of the construction of this new tower. KTSR learned of this decision when the FCC sent a letter asking about the status of the FAA notice, and KTSR inquired of Mr. Fry as to what the circumstances were.

As explained in the Downs Declaration and in the attached Declaration of Roy P. Stype III (the "Stype Declaration"), KTSR hired Roy Stype of Carl Smith Consulting Engineering to prepare an amendment to its January 1997 application, specifying operation on the replacement tower at the coordinates of Mr. Fry's original tower. While drafting this amendment, Mr. Stype

discovered that Mr. Downs in preparing his January application had misinterpreted an aeronautical chart and, as a result, had inaccurately defined the city boundaries of College Station. See Stype Declaration at 2-3. Using the correct boundaries, Mr. Stype's analysis showed that operation from the new KTSR site would provide city-grade coverage to 91.6% of College Station. The Commission granted this application, as amended, on March 20, 1998, over Henderson's request that it be stayed.^{8/} The Commission should not reopen this application which was granted long ago to re-examine the factual circumstances surrounding that application.

Nevertheless, the facts described above demonstrate the baseless nature of Henderson's unsupported allegations. These facts, supported by three declarations, two from parties independent of KTSR, demonstrate that KTSR did not file a "sham" application in January 1997, as Henderson charges, or deliberately hide any inability to provide 100% city-grade coverage to College Station from its proposed construction permit site, or mislead the FCC about an FAA filing. The sequence of events that Henderson chalks up to conspiracy, fraud, and cover-up was instead the result of miscommunications between KTSR and Mr. Fry about where the new tower was to be located, and Mr. Downs' misinterpretation of a aeronautical map of College Station. Counter to Henderson's claims, KTSR has always presented to the Commission what it believed to be an accurate measure of its city-grade coverage.

In this and prior filings, Henderson has sarcastically wondered how KTSR could have applied for a construction permit for a "new" tower in January 1997, when it "must have known" that it would really be operating on an "existing" tower, as specified in its July 1997 amendment. Motion at 9-11. As shown above and in the attached declarations, however, at the time the January 1997 application was being prepared, either of the proposed towers, whether at the

^{8/} See note 1, supra.

KTSR-specified site or the original tower site, would have been described as a “new tower.”

When the July amendment was prepared, Mr. Fry’s construction had occurred, and thus the tower specified in KTSR’s July 1997 filing had to be characterized as an “existing” tower. Thus, no doubt to Henderson’s great disappointment, this “new/existing” discrepancy is not evidence of any plot to defraud the Commission, but is instead the result of a change in facts between the dates on which those applications were prepared.

In addition, contrary to Henderson’s brazen assertions, the purpose of the instant application was not to influence the Commission’s analysis in the related allotment proceeding. As an initial matter, as KTSR has pointed out repeatedly in the allotment proceeding (and, in this filing, supra at 3), permittees have the flexibility to choose a site that achieves less than full-city grade coverage. It is only at the allotment stage that full city-grade coverage is required, and Henderson’s defective allotment proposal in that proceeding could not achieve full city-grade coverage from any site. For this reason, KTSR fully expects that the Commission will uphold its grant of the KTSR allotment proposal, and it does not seek to “manipulate” the Commission’s decision-making processes with this application.

Moreover, as described in the Downs Declaration, KTSR management learned in May or June 1998 that, for technical reasons, the tower Mr. Fry had built would not accommodate KTSR’s operations, and thus, it would be unable to operate on Mr. Fry’s replacement tower. This decision was made well before the Court appeal, or the remand on which Henderson pins KTSR’s decision to relocate to the new proposed site. Rather than pay to retrofit that tower, KTSR opted to build a new tower, and, as would any responsible permittee, it selected a site that would enhance city-grade coverage in any new growth areas of College Station. As set forth in the Stype Declaration, Mr. Stype was brought into the process in August 1998, confirming the Downs declaration. The process of locating a site, conducting FAA studies, and negotiating the

rights to this property culminated in March 1999, and KTSR filed its modification application on April 19. Thus, these decisions were driven not by the allotment proceeding, as Henderson contends, but by the business concerns of the applicant.

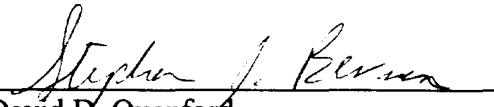
Thus, none of Henderson's exhaustive and exhausting charges have any merit whatsoever. His conspiratorial and erroneous assessment of KTSR's conduct and character do not justify denial or dismissal of the instant application, or a hearing on any of the issues described above.

Conclusion

For the reasons set forth above, the Commission should expeditiously grant KTSR's above-captioned modification application.

Respectfully submitted,

**BRYAN BROADCASTING LICENSE
SUBSIDIARY, INC.**

By: 
David D. Oxenford
Stephen J. Berman

Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006
(202) 659-3494

Dated: June 4, 1999

DECLARATION OF BEN DOWNS

I, Ben Downs, Executive Vice President of Bryan Broadcasting License Subsidiary, Inc. ("Bryan"), the licensee of KTSR(FM), College Station, Texas, hereby declare under penalty of perjury:

Following the Commission's 1995 decision granting Bryan's channel allotment proposal and the 1996 decision upholding that grant, Bryan management, including myself, began to make arrangements for the necessary construction of KTSR's upgraded facilities. In 1996, Bryan's engineer and I engaged in specific discussions with Chet Fry, a local tower owner, regarding our tower needs. We understood that Fry was planning to replace his existing tower in Benchley, Texas around that time, and we discussed locating Fry's new tower a few hundred feet from his existing tower. This would eliminate a minor short-spacing between KTSR and KCKR in Waco, Texas which would have existed from the existing Fry tower. Based on our discussions with Mr. Fry, and as we were to be the principal tenant on the new tower, we believed that Mr. Fry had agreed to locate the tower in the spot we had discussed.

Following these discussions, I prepared an application for a construction permit on FCC Form 301 that specified the new tower location that we had discussed in our conversations with Mr. Fry. I prepared the application as a cost-saving measure, believing that I had enough technical knowledge to do so. It was my understanding that Mr. Fry had notified the FAA regarding this new tower. Thus, when I completed the application, I indicated that the FAA notification had been submitted, believing that Mr. Fry had done so. When the Commission's staff wrote us in May 1997 asking for the status of FAA approval, I again looked into the situation, and discussed it with Mr. Fry.

Because of the uncertainty presented by the allocations process, Bryan could not commit

to a firm date on which we would need the tower. Apparently, to accommodate his other tenants, Mr. Fry decided to go ahead and replace his existing tower, without waiting for us. He built his new tower directly adjacent to his old tower, rather than at the location we had discussed several hundred feet (or 00-00'-04") away. Because he built at the existing site without changing the height of the tower, he never notified the FAA of the construction of the new tower.

Because that new tower was short-spaced to KCKR, Bryan hired Roy Stype of Carl Smith Engineering to prepare an amendment responsive to the Commission's request for FAA information. This amendment included a contour protection showing that would enable the station to operate at Fry's original site (on the new tower) while protecting KCKR, and a showing with respect to the lack of city-grade coverage. The lack of city-grade coverage was discovered by Mr. Stype in preparing this amendment, as he determined that the aeronautical chart I had used to determine the city boundaries of College Station did not accurately portray those boundaries. In July 1997, Bryan filed its amendment to the January application, specifying operation on the replacement tower at the coordinates of Fry's original tower.

Following the Commission's March 1998 grant of the July 1997 application, Bryan management personnel in May or June 1998 visited the tower location with Steve Schott, a representative of Harris Corporation. At that time, Mr. Schott indicated he did not believe KTSR could mount a multi-bay FM antenna on the new tower and have a clear aperture. Indeed, the tower was built using anti-torque devices on the guy points that, in order to permit KTSR's operations, would have to be removed at considerable cost. Rather than spend the money to retrofit this existing tower, Bill Hicks, President of Bryan, and I chose to build a new tower in an area that would enable us to provide city- grade coverage to any new growth area in and around College Station. To ensure coverage of the entire area of College Station, and otherwise comply

with Commission rules, Bryan purchased an Area-To-Locate study from Smith Engineering after we had the opportunity to digest the information from Mr. Schott. That report was ordered on August 19 and delivered to us in late September, 1998. Thereafter, we searched for a new site at which we would build a tower. We located a site in January. Preliminary FAA studies were done in January and early February. We completed negotiations for the property in March, and the application for the new site was filed in April 1999.

Thus, the changes that Bryan has sought with respect to the construction permit for KTSR have been the combined result of legitimate engineering concerns, not any attempt to mislead the Commission or play games with the allocations process. While the January 1997 application was flawed because of the above-described miscommunication with Fry concerning the FAA filing, this mistake was purely unintentional, based on my good-faith belief that the FAA notice had already been filed by Mr. Fry. None of the applications filed by Bryan has been "sham" or otherwise fraudulent as argued by Roy Henderson.



Ben Downs

Date: 5/28/99

AFFIDAVIT

State of Ohio)
) ss:
County of Summit)

Roy P. Stype, III, being duly sworn, deposes and states that he is vice president of Warmus and Associates, Inc., and engineering manager of its subsidiary Carl E. Smith Consulting Engineers ("the firm"), located at 2324 North Cleveland-Massillon Road in the Township of Bath, County of Summit, State of Ohio. The firm was retained by the Bryan Broadcasting License Subsidiary, Inc., licensee of Radio Station KTSR(FM) - College Station, Texas, to provide engineering services associated with the process of modifying the construction permit (BMPH-970124IA) held by KTSR to upgrade from Channel 221A to Channel 236C2. The timeline associated with the various portions of this project are outlined below:

8/19/98 - The firm was authorized by the licensee of KTSR to conduct detailed allocation studies to identify the permitted site location area for operation on Channel 236C2 by KTSR.

9/24/98 - These studies were completed and a detailed letter report and map exhibit, outlining the results of these studies were forwarded to the licensee of KTSR.

1/25/99 - The licensee of KTSR notified the firm that it had located a site which appeared to be suitable for use by KTSR on Channel 236C2.

1/27/99 - Due to the proximity of this proposed site to a public use airport, its location was forwarded to an aeronautical consultant to determine if it was likely that FAA approval could be obtained for a tower of suitable height at this location.

2/2/99 - A written report was received from the aeronautical consultant indicating that FAA approval was likely for a tower of adequate height at this location, provided that the FAA was provided with a surveyor's certification of the ground elevation and coordinates.

3/18/99 - The licensee of KTSR advised the firm it had obtained access to a site immediately adjacent to the location which had previously been studied and forwarded the required surveyor's certification. A further aeronautical study was requested from the aeronautical consultant based on this survey data.

4/5/99 - A written report was received from the aeronautical consultant indicating that FAA approval was likely for a tower of adequate height from this site.

4/15/99 - The FCC 301 application was completed and forwarded to the licensee of KTSR and their legal counsel for filing with the FCC. FAA Form 7460-1 was also forwarded to the FAA's Southwest Regional Office.

The firm had previously been retained in June of 1997 to resolve the issues raised by the FCC in their letter of May 29, 1997 to the licensee of KTSR regarding deficiencies in the then pending application (BMPH-9701241A) for a construction permit to implement the authorized Channel 236C2 upgrade for KTSR. It was during the process of resolving these deficiencies that the firm, and the licensee of KTSR, first became aware of the fact that the actual operating facilities proposed in this application would not provide city grade service to 100% of College Station, but would comply with the 80% "substantial compliance" criterion employed for city grade coverage at the application stage. This application, as originally filed, was prepared by a member of KTSR's staff who had only extremely limited experience in the preparation and prosecution of this type of FCC construction permit applications. As a result of this inexperience, the person who prepared this application mistakenly assumed that the yellow shaded area depicted as College Station on an aeronautical chart corresponded to the city limits of College Station and depicted the boundary of this yellow shaded area, which was located totally within the proposed city grade contour, as the city limits. Based on this inadvertent mis-depiction of the College Station city limits, the preparer of this application certified in good faith his opinion that the proposed city grade contour would en-


compass all of College Station. It was only during the process of preparing the July 2, 1997 amendment to this application that the firm discovered that the city limits of College Station actually encompassed a greater area than depicted in this application as originally filed. As a result, this amendment included a more accurate depiction of these city limits and noted that the proposed KTSR operating facilities would encompass 91.6% of College Station, achieving the substantial compliance with the city grade coverage requirements of Section 73.315(a) of the FCC Rules required at the application stage.

The deponent states that the above information is true of his own knowledge, except as to statements made on information and belief and as to such statements, he believes them to be true.



Roy P. Stype, III

Subscribed and sworn to before me on May 28, 1999.



Notary Public

GAIL M. ELROD, Notary Public
Residence - Summit County
State Wide Jurisdiction, Ohio
My Commission Expires May 26, 2002

/SEAL/

Declaration

I, Chet Fry, hereby declare under penalty of perjury:

1. I own a tower near Benchley, Texas. In 1996, I discussed with Ben Downs and Mark Steptoe, representatives of KTSR, the location of their antenna on my tower. About that time, I was planning the construction of a replacement for the then existing tower. It was planned that KTSR would be a tenant on that tower. The KTSR representatives discussed the specifications for their facility, and we discussed constructing the tower a few hundred feet from the existing tower.

2. In 1997, because the construction date for the new KTSR antenna was uncertain, and because I had other users of my tower to accommodate, I decided to construct the new tower immediately adjacent to the site of the old tower, and not at a location several hundred feet away.

3. Later, KTSR learned of the construction of the new tower at the site of the original tower, and modified their FCC application to propose the coordinates of the new tower at that location.

4. For KTSR to transmit from the new tower, as it has been constructed, modifications would need to be made to the tower. I understand that KTSR has decided not to make those modifications, but instead to construct their new facilities at another site. At all times during the past nine years, I would have been willing to accommodate the KTSR antenna on my tower.


Chet Fry

6-2-99
date

CERTIFICATE OF SERVICE

I, Elinor W. McCormick, do hereby certify that I have this 4th day of June, 1999, mailed by first-class United States mail, postage prepaid, copies of the foregoing **"Opposition to Informal Objection and Motion to Deny Application or Designate Application for Evidentiary Hearing"** to the following:

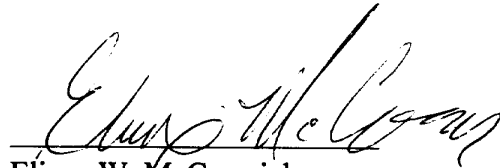
* John A. Karousos, Esq.
Chief, Allocations Branch
Policy and Rules Division
Federal Communications Commission
The Portals
445 12th Street, S.W., Room 3-A266
Washington, D.C. 20554

* James Crutchfield
Federal Communications Commission
Mass Media Bureau
The Portals
445 12th Street, S.W., Room 2-B423
Washington, D.C. 20554

Robert J. Buenzle, Esq.
Law Offices of Robert J. Buenzle
12110 Sunset Hills Road
Suite 450
Reston, VA 20190

John E. Fiorini III, Esq.
Gardner Carton & Douglas
1301 K Street, N.W.
Suite 900
Washington, D.C. 20005

Meredith S. Senter, Esq.
Leventhal, Senter & Lerman, P.L.L.C.
2000 K Street, N.W.
Suite 600
Washington, D.C. 20006-1809


Elinor W. McCormick

***Hand Delivery**